



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2017/0204

Heard at Leicester Magistrates' Court on 25 January 2018

Before
Judge Stephen Cragg Q.C.

Tribunal Members
Mr Nigel Watson
and
Mr Narendra Makanji

Between

John Slater

Appellant

And

The Information Commissioner

Respondent

The Appellant represented himself

The Information Commissioner chose not to be represented at the hearing.

DECISION AND REASONS

INTRODUCTION

1. This is an appeal against the Commissioner's decision notice dated 21 August 2017 which held that the University Hospitals of Leicester NHS Trust (the Trust) had properly applied section 31(1)(g) in conjunction with s31(2)(a) and (c) FOIA, when refusing to disclose the executive summary of the data protection audit report prepared in relation to the Trust and carried out by the Commissioner. The Commissioner required no further action to be taken.

BACKGROUND AND DECISION MAKING PROCESS

2. On 18 January 2017 the appellant (Mr Slater) requested that the Trust disclose the executive summary of the data protection audit report carried out by the Commissioner. Mr Slater became aware of the existence of executive summary as the Commissioner referred to it on its website on 18 January 2016 as follows: -

'The ICO has carried out a data protection audit of the University Hospitals of Leicester NHS Trust with its consent.

University Hospitals of Leicester NHS Trust had asked us not to publish the executive summary of the audit report'.

3. On 15 February 2017, the Trust replied and began by saying that the Trust was 'one of the largest and busiest NHS teaching trusts in the country' with around 14,000 staff serving 'around one million people' locally, and a further two to three million people from the rest of the UK. In 2015-2016 an average of 4,321 patients were treated every day.
4. Disclosure was refused on the basis that: -
 - (a) The information was exempt under s31 of FOIA.
 - (b) The Trust is entitled to rely on s31(1)(g) of FOIA, in that s31(2)(a)-(c) are also engaged.
 - (c) The balance of public interest lay in withholding the information 'to enable proper exploration of the issues referred to in section 31'.

5. It is appropriate at this stage to set out the relevant parts of section 31 of FOIA. Section 31(1) and (2) read materially in this case: -

31.— Law enforcement.

(1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice —

...

(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),

(2) The purposes referred to in subsection (1)(g) to (i) are —

(a) the purpose of ascertaining whether any person has failed to comply with the law,

(b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,

(c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise.

6. Section 31 FOIA is a qualified exemption and subject to the public interest test pursuant to s2(2)(b) FOIA.
7. On 19 February 2017, Mr Slater asked for a review of the decision, querying, amongst other things, the application of the s31(1)(g), as a specific public authority had not been identified, and questioning whether any of the functions in s31(2)(a)-(c) could be carried out by the Trust in any event, if it were the public authority concerned. He also pointed out that no details of the public interest test carried out had been provided.
8. The result of the review is dated 31 March 2017. It was said that ‘section 31 can be claimed by any public authority, not just those with law enforcement functions’. It was not spelt out at all which was the ‘public authority’ in s31(1)(g), and the ‘functions’ for the purposes of s31(1)(g) were not identified in the review. In relation to the public interest test, a list of pros and cons were set out, and it was said that the ‘balance of the public interest has not shifted since the initial decision’. It was said that the Trust was also relying on s36 FOIA, but it was not explained on what basis this was claimed.

9. Mr Slater complained to the Commissioner on 7 April 2017. He complained about the lack of particularity in relation to the reliance on s36 FOIA. He also complained on the basis that it had not been established that s31(1)(g) FOIA applied because the Trust had not identified (a) the public authority that would be prejudiced; (b) the relevant functions involved; or (c) what prejudice would be caused by disclosure. The Trust, he said, had not identified which of s31(2)(a)-(c) applied, and had not established that the public interest test should lead to non-disclosure.
10. Before the Commissioner decided the complaint it can be ascertained from emails between the Commissioner and the Trust that advice was given to the Trust that, in fact, the 'public authority' whose functions might be prejudiced for the purposes of s31 FOIA was the Commissioner herself, and that the Trust was invited to make further submissions to this effect (see note of telephone conversation 13 July 2017 between Sam Coward of the ICO and Steve Murray of the Trust).
11. Those submissions were duly received on the same day when Mr Murray wrote to say: -

I confirm that in my view disclosure of the requested information would be likely to prejudice the ability of the Information Commissioner's Office to perform the statutory role in that it would be likely to introduce a chilling effect which would not be in the public interest. I contend that the voluntary engagement of public authorities with your Office when they wish to improve their processes, is extremely important and would be likely to be prejudiced in the event that we are required to disclose the information requested.

Whilst there is a public interest in promoting accountability which favours disclosure I take the view that the likelihood of prejudice described above means that, on balance, the public interest presently favours withholding the information requested.

12. Having given some guidance to the Trust in relation to this response, Ms Coward then wrote to Mr Slater on 27 July 2017 to say that she was 'inclined to agree with the Trust' that 'disclosure of this information would be likely to prejudice the Information Commissioner's ability to effectively carry out its regulatory function'. If the wishes of the Trust not to have the executive summary published were not respected 'it would be likely to damage the

working relationship between the Information Commissioner and the trust and other data controllers in the UK'. The letter went on to say if the data controllers' wishes in relation to public disclosure is not respected 'the trust has said that it and other data controllers would be very reluctant to actively engage with the Information Commissioner...'. We note that this is not a wholly accurate reflection of what was said in Mr Murray's email of 13 July 2017 (and there is nothing else in the bundle which explains things in these terms).

13. In relation to the public interest test, the letter states that the Trust 'considers there is a greater public interest in the Information Commissioner being able to carry out its regulatory function effectively and at times as quick as possible'. Ms Coward was again 'inclined to agree' with this although, again, the formulation presented does not wholly reflect the submissions made by the Trust in the email of 13 July 2017.
14. Mr Slater objected to this approach and the Commissioner contacted the Trust once more. There is a record of another telephone call between Ms Coward and Mr Murray dated 17 August 2017. The information provided by Mr Murray is couched mainly in general terms as to how he thinks the Commissioner's functions would be prejudiced by disclosure as other data controllers would be discouraged from engaging informally with the Commissioner if they felt they could not object to disclosure. This was also his main point in relation to the public interest test. In relation specifically to the Trust, he is recorded as saying that the Trust wished to have the private space to consider the audit and address any issues raised 'without public interference'. At the end of the note it is recorded that 'They would not engage as willingly in the future...' which appears to refer to the Trust's position. There is no other exposition of the Trust's position in this case, in witness evidence or otherwise.
15. The Decision Notice rehearses the themes set out above in relation to section 31 FOIA. The Trust is said to have 'confirmed that it would certainly be reluctant to engage informally... and it considers it is fair to say that other data controllers would also be very reluctant to engage or approach the commissioner with any issues'. The Trust therefore 'advised' that disclosure would damage the Commissioner's relationships with its stakeholders, the Commissioner would have to rely on costly formal measures and this would be a dis-service to the public.

16. The Decision Notice then states that the Commissioner has consulted her audit and information access departments and is satisfied that the exemption in s31(1)(g) is met (through the engagement of s31(2)(a) and (c)).

THE APPEAL

17. Mr Slater sets out the test which applies when considering the prejudice referred to in section 31(1)(g) FOIA which can be gleaned from the case of *Hogan v Information Commissioner* (EA/2005/0026, 17 October 2006) as follows:-

28. The application of the 'prejudice' test should be considered as involving a number of steps.

29 First, there is a need to identify the applicable interest(s) within the relevant exemption...

30 Second, the nature of the 'prejudice' being claimed must be considered. An evidential burden rests with the decision maker to be able to show that some causal relationship exists between the potential disclosure and the prejudice and that the prejudice is, as Lord Falconer of Thoronton has stated, "real, actual or of substance" (Hansard HL, Vol. 162, April 20, 2000, col. 827). If the public authority is unable to discharge this burden satisfactorily, reliance on 'prejudice' should be rejected. There is therefore effectively a *de minimis* threshold which must be met. ..

31 When considering the existence of 'prejudice', the public authority needs to consider the issue from the perspective that the disclosure is being effectively made to the general public as a whole, rather than simply the individual applicant, since any disclosure may not be made subject to any conditions governing subsequent use.

32...

33 ...

34 A third step for the decision-maker concerns the likelihood of occurrence of prejudice. A differently constituted division of this Tribunal in *John Connor Press Associates Limited v Information Commissioner* (EA/2005/0005) interpreted the phrase "likely to prejudice" as meaning that the chance of prejudice being suffered should be more than a hypothetical or remote possibility; there must have been a real and significant risk. That Tribunal drew support from the decision of Mr. Justice Mundy in *R (on the application*

of Lord) v Secretary of State for the Home Office [2003] EWHC 2073 (Admin), where a comparable approach was taken to the construction of similar words in Data Protection Act 1998. Mr Justice Munby stated that 'likely': *"connotes a degree of probability where there is a very significant and weighty chance of prejudice to the identified public interests. The degree of risk must be such that there 'may very well' be prejudice to those interests, even if the risk falls short of being more probable than not."*

35 On the basis of these decisions there are two possible limbs on which a prejudice-based exemption might be engaged. Firstly, the occurrence of prejudice to the specified interest is more probable than not, and secondly there is a real and significant risk of prejudice, even if it cannot be said that the occurrence of prejudice is more probable than not. We consider that the difference between these two limbs may be relevant in considering the balance between competing public interests (considered later in this decision). In general terms, the greater the likelihood of prejudice, the more likely that the balance of public interest will favour maintaining whatever qualified exemption is in question.

18. Mr Slater argues that the Information Commissioner has failed to show that disclosure in this case would deter data controllers from approaching her on a voluntary basis. He refers to the Ministry of Justice's response to a consultation about *'Assessment Notices under the Data Protection Act 1998 – Extension of the Information Commissioner's Powers* (CP9/2013, 15 July 2014), which considered the extension of the Commissioner's compulsory powers of audit to NHS bodies. This notes, amongst other things, that the majority of NHS bodies were in favour of extending the Commissioner's powers as described, and that the most commonly held view was that this 'would lead to an increase in the uptake of consensual audits by NHS bodies'. Mr Slater argues, therefore, that the Commissioner's compulsory powers are a key driver for voluntary engagement, and that disclosure in this case will not change that.

19. He also notes that although the Trust has resisted disclosure of the executive summary of the audit, its 2016/2017 annual report contains details of 'two serious untoward incidents involving a lapse of data security' which had been reported to the Commissioner, and other 'personal data related incidents' where the Trust has carried out investigations.

20. The Commissioner has set out in her response to the appeal some detail about the auditing process referred to. Thus, the Commissioner has identified audit as having a key role to play in educating and assisting organisations to meet their obligations under the (Data Protection Act 1998) (DPA). To this end the

Commissioner's office undertakes a programme of consensual audits to assess organisations' processing of personal data and to provide practical advice and recommendations to improve the way organisations deal with information rights issues. This approach is underpinned by s51(7) of the DPA which states that the Commissioner can, with the consent of the data controller, assess the processing of personal data for the following of good practice.

21. The Commissioner issues guidance to organisations entitled "*Auditing data protection – a guide to ICO data protection audits*" (the guidance). This, and the Regulators' Compliance Code, both outline that the consensual auditing process should be participative, constructive, and adopted as a way to achieve outcomes by "less burdensome means" than the Commissioner having to use other regulatory powers.
22. As the Commissioner says, its audit programme is proactively published on the Commissioner's website, and the names of the organisations who have agreed to an audit are listed.
23. Following the completion of the audit the Commissioner produces a comprehensive report, and an executive summary described by the Commissioner in these proceedings as a 'high level document and contains only the background to the audit, the overall audit opinion and the areas of good practice/needing improvement'. The detailed findings are not published.
24. The Commissioner's guidance referred to above states: -

The ICO will not proactively publicise details of consensual audit reports. However, there may be instances in which publicising a report would help to educate other data controllers, prevent further breaches, or be of interest to the public. In these cases the Commissioner would look for the consent from the organisation concerned.

25. However, the guidance also states that: -

After an audit we will ask the organisation to agree to us publishing the executive summary on the ICO website. If it agrees, we will publish. If it does not agree, we will publish a comment on our website that an audit

took place but that the organisation declined to have the executive summary published.

26. The 'frequently asked questions' section of the guidance states: -

For consensual audits, we will not publish the executive summary without permission. This is a high-level document and contains only the background to the audit, the overall audit opinion and the areas of good practice/needing improvement. The detailed findings contained in the back of the report are not published.

27. The Commissioner's submissions in this case state that the consequent practice of the Commissioner is to ask the organisation concerned to agree to the Commissioner publishing the executive summary. If that agreement is not forthcoming, the Commissioner will publish a comment on the website that an audit took place but that the organisation has declined to have the executive summary published.

DISCUSSION AND DECISION

Likelihood of prejudice to the exercise of the Commissioner's functions

28. The essential reasoning of the Commissioner is that she relies heavily on the willingness of data controllers to engage with her. When a data controller does so, a clear objection to publish any results of an audit 'must carry significant weight'. A reluctance of data controllers to co-operate and agree voluntary audits would make the Commissioner's ability to carry out her regulatory functions more difficult and time consuming. Even though very many summaries of voluntary audits are published, and this is expected by the Commissioner, any objection to publication is considered to be 'reasonable'.

29. The Commissioner acknowledges the public interest in transparency and accountability, and in the public being assured that a public authority has effective measures in place to ensure compliance with the DPA. But because

the Trust says that it would be more reluctant to co-operate with the Commissioner in the future, and thinks that other data controllers would also take that approach, the balance of the public interest lies, says the Commissioner, in upholding the exemption in order not to lose the willingness of the Trust and others to co-operate.

30. Mr Slater had some concerns about the way that the Trust had seemingly been assisted by the Commissioner in formulating its grounds for claiming an exemption from disclosure. There is, indeed, a sense that the Trust has been invited to make submissions about how data controllers in general would react in their dealings with the Commissioner if a decision in this case to order disclosure is made. It is clearly the Commissioner who is better placed to express a general view on this issue and not the Trust. Indeed, as we have said, other than an email and a telephone record, there is no evidence provided by the Trust to support that general position.

31. It is by no means obvious to us that a decision to disclose on the specific facts of this case, relating to the specific contents of this executive summary, would lead to significantly fewer public authorities co-operating with the Commissioner either in the health sector or on a wider basis. In relation to the health sector, at least, we note that there appears to be widescale agreement that executive summaries should be published following a voluntary audit and the Commissioner's website indicate this is indeed what happens. As Mr Slater pointed out during the hearing, with reference to a printout from the website, it appears that the majority of health bodies who have been subject to a consensual audit have, in fact, agreed to the publication of the executive summary on the website. It therefore seems to us that, within the health care sector at least, things may well continue as they are now, and that the decision in this case is may well not make a significant difference. It also seems difficult to us to extrapolate an anticipation as to how other data controllers in general would react to a decision to disclose in this case in the absence of any evidence before us.

32. However, we bear in mind the comments in the decision notice which set out the views of the Commissioner herself as to the likelihood of prejudice, and also that the test in s31 FOIA in relation to the word 'likely' means only that there must be a real and significant risk of prejudice arising if the information was released. We are of the view that that test is met, and on that basis we find that there is, indeed, a causal link between the proposed disclosure and the likely prejudice to the Commissioner's functions.

33. However, first of all, although we find that the test of likely prejudice is met, we do not find that prejudice to the Commissioner's functions would be more probable than not to occur, and this is a factor that, as explained in *Hogan* 'may be relevant in considering the balance between competing public interests' (see below). In addition, we do not find established the *extent* of the likely prejudice claimed by the Commissioner. In relation specifically to the Trust, for example, the most that has been said is that the Trust would be reluctant or less willing to engage in the future, not that it would not actually do so. In relation to this, we think there is some relevance in the documents that Mr Slater has cited that indicate that the existence of compulsory powers is a key driver to voluntary co-operation and that the Trust does, in any event, publish in its annual report details of specific DPA breaches.

Public interest

34. In the light of those findings we need to continue to consider the application of the public interest test which in our view, when properly applied, should lead to disclosure in this case.

35. As indicated above it seems to us that any prejudice is 'likely' only in the sense that there is a substantial risk that it will occur, and not that it is more probable or not. In addition it is our view that it has not been shown that disclosure will have a significant impact on the exercise of the Commissioner's functions, and we would not give so much weight to this factor as the Commissioner has done in the decision notice.

36. The information request relates only to the executive summary of the report of the voluntary audit and not to the report itself. The Trust and other data controllers have the knowledge that the detail of the report will not be disclosed in any event. It is also not the case that a decision that *this* executive summary report should be disclosed is a precedent to say that all executive summary reports must be disclosed when requested. The engagement of s31 FOIA and the balance of the public interest must be assessed in each case. The Trust and other data controllers, properly advised, should have been aware that disclosure of an executive summary is possible if the conditions under FOIA are met, notwithstanding the approach and published guidance of the Commissioner.

37. In relation to the public interest in favour of disclosure, as set out above we note that the Trust, as part of its decision-making process, has provided to Mr

Slater the details of the very large number of patients it treats as one of the largest teaching University Trusts in the country. It seems to us that there is a very significant public interest in this very large number of patients being assured that the Trust has effective measures (or not, as the case may be) in place to ensure compliance with the DPA, and in relation to its processing of those patients' personal data. In our view this significant public interest outweighs by some amount any limited prejudice that the Commissioner is likely to suffer in the exercise of her functions as a result of disclosure.

38. We note that in *Mansfield v Information Commissioner* EA/2016/0255 (18 August 2017) cited by the Commissioner in further written submissions, the Tribunal came down in favour of non-disclosure when applying the public interest test, in a section 31(1)(g) FOIA situation. However, we also note that, in that case, very little weight was given to the public interest in disclosure because the Tribunal was not convinced that the appellant required disclosure for his main purpose of effectively pursuing a remedy as he had claimed. The Tribunal said at para 45 of the decision that 'The availability of alternative remedies significantly reduces the public interest attached to the disclosure of this information for the reasons advanced by the Appellant'.
39. Thus, the fact that the public interest balance came down against disclosure in the *Mansfield* case, provides very little guidance to us in the present case as to how the balance should be struck.

Section 36 FOIA

40. The Trust relied on s36 FOIA in addition to s31 FOIA as a reason for non-disclosure. However, as noted above the Trust provided no explanation as to the basis upon which it relied on s36. Mr Slater complained about the reliance on s36. The Commissioner decided not to address the s36 point in her decision notice, as she was satisfied that the exemption in s31 FOIA was made out. Mr Slater also made submissions about s36 in his appeal and skeleton argument.
41. Section 36 reads, materially, as follows: -

36.— Prejudice to effective conduct of public affairs.

- (1) This section applies to —
 - (a) ...
 - (b) information which is held by any other public authority.
- (2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act —

- (a) ...
- (b) would, or would be likely to, inhibit –
 - (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purposes of deliberation, or
- (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

42. In our view, no arguments at all have been presented by the Trust to defend the reliance on s36 FOIA. We find there is nothing in this case, and certainly no evidence, which indicates that the exemption in s36(2) FOIA is made out. Even though the Commissioner has decided not to address the s36 FOIA in the decision notice, it is our role to consider it. Given the lack of particularisation and evidence from the trust, and our view that the exemption is not therefore established, we would allow Mr Slater's appeal on this issue also.
43. For the reasons stated this appeal is allowed and this decision notice substituted for the Commissioner's decision. The Trust is to disclose the executive summary of the data protection audit report as requested by Mr Slater
44. Our decision is unanimous

Signed *Stephen Cragg QC*

Stephen Cragg QC

Judge of the First-tier Tribunal

Date: 14 March 2018.

(Case considered by Panel on 25 January 2018).